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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 116

LEO H. BOHLING,

Appellant,

vs.

EDWARD CORSI, COMMISSIONER, AND/OR DIVISION OF EMPLOYMENT OF THE DEPARTMENT OF LABOR OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 116

LEO H. BOHLING, RESIDING AT 1426 GOODRICH AVENUE, UTICA, NEW YORK,

Appellant,

vs.

EDWARD CORSI, COMMISSIONER, AND/OR DIVISION OF EMPLOYMENT OF THE DEPARTMENT OF LABOR OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

To the Honorable Stanley Reed, Associate Justice of the Supreme Court of the United States:

Leo H. Bohling, Appellant in the above entitled case and Petitioner for the allowance of an Appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of New York in this cause, hereby respectfully presents a separate typewritten statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Court of Appeals of New York, said statement being filed pursuant to Rule 12 of the Supreme Court of the United States.

Statutory Provision Believed to Sustain Jurisdiction

1. Title 28, United States Code, Section 1257, Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. C. A. Section 1257, F. C. A. 28 Section 1257, provides as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) —.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Statute of the State of New York, the Validity of Which Is Involved

2. The Statute of the State of New York, the validity of which is involved in this cause, is the Unemployment Insurance Law 562, Subdivision 1, (Labor Law Article 18, 562, Subdivision 1) which reads as follows:

> "Section 562. Termination of Coverage.
>
> "1. Required coverage. Any employer who has become once liable for contributions under this article shall cease to be liable under the following conditions:
>
> "a. If he files a written application with the commissioner during the fourth calendar quarter, he may be released from coverage as of the first day of the next calendar quarter provided the commissioner finds that the employer has not employed four or more persons in employment within each of fifteen or more days in the completed calendar year in which the application is filed.
>
> "b. If he files a written application with the commissioner in any other calendar quarter of the year he may be released from coverage as of the first day

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of the calendar quarter following the filing of the application provided the commissioner finds the employer has, before such day, in neither the calendar year in which the application is filed nor in the preceding calendar year, employed four or more persons in employment within each of fifteen or more days."

Date of Judgment Sought To Be Reviewed, and Application for Appeal

3. The judgment sought to be reviewed was entered by the Court of Appeals of New York on March 4, 1954. The Remittitur of the Court of Appeals, the Order of the Supreme Court, County of Oneida, and the Judgment of the Supreme Court, County of Oneida, was entered in the Office of the Clerk of the Supreme Court, Oneida County, on March 22, 1954, and a copy, with notice of entry, was served on the appellant's attorney by mail, March 31, 1954.

The application for appeal to the Supreme Court was duly presented to the Honorable Edmund H. Lewis, Chief Judge of the Court of Appeals of New York, on March 30, 1954, and the said application was denied by said Chief Judge on April 17, 1954.

Statement of the Nature of the Case

4. On April 14, 1953, Petitioner filed a complaint against the Appellee in the above entitled case in the Supreme Court of New York, praying for judgment declaring the aforesaid statute to be unconstitutional, in-so-far as it precribed a tax for one full year after the petitioner's pay roll had dropped to less than four employees. The complaint averred that said statute is repugnant to the Constitution of the United States, as follows:

"Third: That said section 562 of the Labor Laws of New York State violates the Federal and State Constitutions, in-so-far as it sets up an arbitrary and

unreasonable classification for a tax; specifically, it compels all employers of three or less to pay a pay roll tax if they employed four persons in a previous year; and exempts from taxation those employers of three persons who have not employed more than three persons. That such a provision of law makes it difficult if not impossible for employers of the same class to compete with others in the same class; it denies an equal rate of taxation; and requires persons to pay a tax on income for a future period when there is no such income; and lastly, it creates a trap, by setting up a complicated system which employers would unwittingly transgress, by hiring extra help for a short time, and paying a pay roll tax for at least a year afterwards, if not two years. That said tax sets up no reasonable standard to distinquish liability from non-liability, and is in all respects unconstitutional."

5. The Defendants answered the complaint by pleading the constitutionality of the said statute, and moving for judgment on the pleadings, which was granted August 26, 1953, by the Supreme Court of the State of New York, held in and for the County of Oneida.

6. The opinion of the said Supreme Court, delivered by Mr. Justice E. Howard Ringrose, set forth each of the above stated contentions of the plaintiff-appellant, and concluded that these contentions were without merit, and that said law did not violate the United States Constitution.

7. The constitutionality of the above statute has been the sole issue in this case, and the decision of the Supreme Court of New York, Oneida County, was appealed directly to the Court of Appeals of New York, on the ground that the only question was the constitutionality of a statute, and the said Court of Appeals affirmed the judgment of the Court below.

8. The Court of Appeals of New York by its judgment entered March 4, 1954, expressly decided the question re-

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specting the validity of said statute, and held that it was not repugnant to the United States Constitution.

Authorities Believed to Sustain Jurisdiction

9. Petitioner cites *Connecticutt General Life Ins. Co.* v. *Johnson*, 303 U. S. 77, and *Standard Oil Co. of California* v. *Johnson*, 316 U. S. 481 as sustaining the jurisdiction of the Supreme Court of the United States upon appeal.

Authorities Showing Question Is Substantial

10. The appellant believes the issues in this case are substantial for the following reasons:

1. Forty-one states have similar provisions in their unemployment insurance laws, and none have been reviewed by the United States Supreme Court. New York State has recently adopted a similar tax measure in its Workman's Compensation Law, (Section 202) indicating that this means of taxation, and continuing liability for a year or more after the facts upon which liability is based have ceased to exist, may be greatly extended in the future. The fact that in the fifteen years history of this form of liability, no case has been taken to the United States Supreme Court, can be explained by the fact the measure only affects employers of less than four, who are unlikely to have the resources to support a constitutional test case.

2. The said tax is an innovation in American Tax Law, being the first instance that has come to our attention of liability being imposed because of a previous status of liability. When the facts establishing liability have ceased to exist, the tax liability is continued for the remainder of the year, and for an additional calendar year, before an application to terminate coverage and liability may be entertained. This tax is a departure from the time honored universal custom of determining a tax payer's liability for

a given tax according to his actual status during the period of taxation, without regard to previous status.

3. The tax is a hardship to small employers throughout the United States; it serves as a trap, and a hidden pitfall. Small employers are thereby required to pay a 2.7% tax on pay rolls from which tax others in the same business, location, and size pay roll, all similarly situated, are exempt—the sole distinction between those taxed and those not taxed being based on a past condition.

The Court below relied upon the case of *Carmichael* v. *Southern Coal & Coke*, 301 U. S. 495, at page 511, (See attached printed opinion of Mr. Justice Ringrose) which read:

> "Administrative convenience and expense in the collection or measurement of the tax are alone a sufficient justification for the difference between the treatment of small incomes or small tax payers and that meted out to others."

It is respectfully submitted that the above quoted decison was used to uphold taxing all employers of eight or more, and exempting those of under eight, on the theory that the cost of collection was comparatively prohibitive; but that the above quoted passage does not by implication justify a tax on some small employers, while leaving their competitors of the same sized pay roll, untaxed for one year.

It is further contended that the learned Court below failed to give proper importance to the final words of the Supreme Court on this subject, in the *Carmichael* case, at page 513.

> "In no case do appellees sustain the burden which rests upon them of showing that *there are no differences between the exempt employer and the industrial employers* who are to be taxed, sufficient to justify differences in taxation."

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We respectfully maintain that these words strongly suggest that the Supreme Court of the United States still feels that the Equal Protection Clause of the Fourteenth Amendment protects tax payers from taxes "where there are no differences between tax employers and exempt employers." The words "sufficient to justify differences in taxation" we respectfully assume to mean "differences that are substantial, and not trivial".

We would like to emphasize that the difference here can only be ascertained by going into the tax payer's past: that the use of this tax measure can only result in frightening employers away from hiring an additional employee for a few weeks, as it is gradually learned what dire penalties await the employer unfortunate enough to be caught in this pitfall; with a result that fewer, and not more employers will be crossing the line whereby their employees are covered by unemployment insurance.

We respectfully submit that the argument of "administrative convenience," (supra) has been used for the sole purpose of supporting a tax and justifying exemptions solely in circumstances where another method would result in great expense to collect a small return; it has never been employed to continue liability after the facts on which liability are based have ceased to exist, for some sociological purpose of the government without regard to the fact that the tax payer is unduly handicapped in relation to his competitors.

We further submit that the "Equal Protection" clause is not by definition or by judicial interpretation limited to a protection against inequality where the taxing power has an evil motive directed against the specific tax payer; but that there are instances wherein a seemingly impersonal rule of law operates with obvious injustice against tax payers in such a manner as to strike at their very livelihood.

This tax is assessed on a theory of presumed continuing liability. It is in sharp contrast to the Internal Revenue Code and other taxes which have at all times, at no small expense, aimed for fair play and equality for those in the same general situation. It goes further than any known federal or state tax, and specifically, the federal social security tax.

4. This case and the question presented is novel so far as the Supreme Court is concerned.

5. Since this case was decided by the New York Court of Appeals, New York State has passed legislation, to come into effect when Congress passes appropriate federal supporting legislation, prescribing this tax for all employers, regardless the size of this pay roll, indicating that the end of this issue is in sight, upon legislation being passed whereby all pay rolls are taxed, regardless of size; since in that case pay rolls will never drop below the size which distinguished taxability from non-taxability; that this proposed legislation indicates that this system of continuing liability has never been really necessary to a well thought out program of unemployment insurance; and that those who have been caught under an arbitrary tax for an extra year are entitled to some relief.

11. A copy of the only opinion filed in this case, namely that of Mr. Justice E. Howard Ringrose, is appended hereto.

Respectfully submitted,

Merwin K. Hart, Jr.,
Attorney for Appellant,
Office & P. O. Address,
196 Genesee St.,
Utica, New York.

April 27, 1954.

APPENDIX "A"

Opinion of Mr. Justice Ringrose

State of New York, Supreme Court
County of Oneida

[Same Title.]

Appearances:

Merwin K. Hart, Jr., Esq., Attorney for Plaintiff, 196 Genesee Street, Utica, New York.

Hon. Nathaniel L. Goldstein, Attorney General, Attorney for Defendants (Wendell P. Brown, Esq., and Francis R. Curran, Esq., of Counsel), Albany, New York.

Ringrose, J:

The plaintiff in this action seeks a judgment declaring unconstitutional the provisions of the Unemployment Insurance Law (Labor Law, Sec. 562) relating to the termination of the liability of an employer for the 2.7% pay roll tax. The legal conclusions alleged in the complaint are denied in the answer, and judgment declaring the challenged provisions constitutional is sought by the defendant. Both parties move for judgment on the pleadings.

The undisputed facts are: The plaintiff, a building contractor in the City of Utica, New York, employed four persons from April, 1947, to January, 1951. Sometime in the first quarter of the calendar year 1951, the number of the plaintiff's employees was reduced to less than four and he has employed less than four persons at all times since.

As the employer of four or more persons, the plaintiff was liable under the Unemployment Insurance Law (Labor Law Art. 18) for the 2.7% pay roll tax and remains liable even though the number of his employees are less than four, until such time as he is released from liability by the Commissioner of Labor. The

plaintiff has and is being assessed a pay roll tax at the specified rate, which will continue for a year or more after the date he ceased to employ four or more persons, and he is prohibited by the statute from denying his liability under said Labor Law, or terminating said tax liability, until he has paid a pay roll tax at the aforesaid rate for a period of at least one year after he ceased to employ four persons.

It appears from the complaint to be the contention of the plaintiff that the statute is discriminatory and therefore unconstitutional, in that it prescribes an arbitrary and unreasonable formula for determining the tax liability or non-liability as between employers employing three and those employing more than three persons, following a change in the status of an employer by the reduction of the number of his employees to less than four. Thus the issue is limited to the legality of the continuing liability for the tax following a change in status by a reduction in the number of employees. It is assumed in the absence of an allegation to the contrary that plaintiff never filed a written application with the Commissioner to be released from liability pursuant to Section 562 of the Labor Law.

The pertinent provisions of the Unemployment Insurance Law (Labor Law Sections 560 and 562) on this issue, are as follows:

"Sec. 560. Terms of coverage

"1. Liability. Any employer shall become liable for contributions under this article if he employs in all of his several places of employment in the state four or more persons in employment on fifteen or more days in any calendar year, except that persons employed in personal or domestic service in private homes shall be considered separately and that an employer shall become liable for contributions with respect to them only if he employs in such service four or more persons within the period and under the conditions above provided. Such liability for

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contributions shall commence on the first of such fifteen days of employment.

"An employer who, by operation of law, becomes successor to an employer liable for contributions shall become liable for contributions on the day of his succession. This provision shall not affect such successor's liability as otherwise prescribed by law for unpaid contributions due from his predecessor."

"Sec. 562. Termination of coverage

"1. Required coverage. Any employer who has once become liable for contributions under this article shall cease to be liable under the following conditions:

"a. If he files a written application with the commissioner during the fourth calendar quarter, he may be released from coverage as of the first day of the next calendar quarter provided the commissioner finds that the employer has not employed four or more persons in employment within each of fifteen or more days in the completed calendar year in which the application is filed.

"b. If he files a written application with the commissioner in any other calendar quarter of the year he may be released from coverage as of the first day of the calendar quarter following the filing of the application provided the commissioner finds the employer has, before such day, in neither the calendar year in which the application is filed nor in the preceding calendar year, employed four or more persons in employment within each of fifteen or more days."

Section 562 as originally enacted was contained in Section 502, subdivision 3 of the Labor Law, and read as follows:

"'Employer' means any persons, partnership, firm, association, public or private, domestic or foreign corporation, the legal representatives of a

deceased person, or the receiver, trustee or successor of a person, partnership, firm, association, public or private, domestic or foreign corporation (excluding the State of New York, municipal corporations and other governmental subdivisions), who or whose agent or predecessor in interest has employed at least four persons in any employment subject to this article within each of thirteen or more calendar weeks in the year nineteen hundred thirty-five or any subsequent calendar year shall make a newly-subject employer subject for all purposes as of January first of the calendar year in which such employment occurs * * *."

It was also therein provided:

"* * * Any employer subject to this article shall cease to be subject hereto only upon a written application by him and after a finding by the commissioner that he has not within any calendar week within the last completed calendar year employed four or more persons in employment subject thereto. Any employer (of any person within the state) not otherwise subject to this article shall become fully subject hereto, upon filing by such employer with the commissioner of his election to become fully subject hereto for not less than two calendar years, subject to written approval of such election by the commissioner."

It is the contention of the defendant that Section 562, Subdivision 1 of the Labor Law was designed to avoid inequitable treatment of employees entitled to benefits, which resulted from the procedure by which an employer's liability for the tax was terminated, and also to facilitate the administration of the law.

Under the present law (Labor Law, Sec. 527, L. 1951 Ch. 645, eff. June 4, 1951) an applicant for unemployment insurance must have had at least twenty weeks of employment in the fifty-two week period preceding the filing of his claim, and must have earned an average

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wage of at least $15.00 per week in at least twenty weeks of employment in such fifty-two week period. Prior to that time a claimant was required to have earned a certain amount of wages in covered employment during his "base year," which was the calendar year immediately preceding the beginning of a benefit year (L. 1944, Ch. 705). "Benefit year" was defined as the period from the first Monday falling in the month of June in each calendar year to and including Sunday which follows the last Monday falling in the month of May in the next calendar year (Labor Law, Secs. 520, 521 and 590, L. 1944, Ch. 705).

The reason for the enactment of present Section 562, Subdivision 1, and its predecessor, is thus self-evident. It avoids the situation of an employee being in covered employment for a portion of a "base year" and not for the entire year, which might reasonably occur where an employer subject to the tax reduces the number of his employees to less than four during the year and could terminate his liability at the end of that year instead of at the close of the next calendar year as provided under the present section. As suggested in the brief of the Attorney General, without the provisions of Section 562, Subdivision 1 "an employer who became subject to the law on July 1, 1952, by reason of having employed four or more persons within each of fifteen or more days commencing on that date, would be subject to the tax for the remainder of the year 1952, but if he did not employ four or more persons commencing on January 1, 1953, his employees might not be covered under the statute for several months during that year, until such time as the employer again employed four or more persons for the required period of time."

The foregoing illustration appears more visionary than real in view of the present minimum wage requirement necessary to qualify for unemployment insurance benefits (Labor Law, Sec. 527, L. 1951, Ch. 645), although the amount thereof might be less except for the amendment.

The question posed is whether the law provides a reasonable and rational basis of classification of employers subject to the tax where an employer ceases to employ four or more persons. This Court will be guided by the rule that "Court's of first instance should not exercise transcendent power of declaring an act of the Legislature unconstitutional except in rare cases involving life and liberty, and where invalidity of the act is apparent on its face." (McKinney's Statutes, 1953 Cum. Supp. Sec. 150, and authorities cited.)

The plaintiff concedes that the constitutionality of the Unemployment Insurance Law has been conclusively established as a reasonable exercise of the police power for the public welfare. (*Chamberlain, Inc., v. Andrews*, 271 N. Y. 1, 299 U. S. 515.)

The plaintiff maintains that the provision of the statute in question is, on its face, so arbitrary, unreasonable and oppressive that it denies to the plaintiff the equal protection of the law. The plaintiff relies upon the case of *Gulf, Colorado, and Santa Fe Railway Co. v. Ellis* (165 U. S. 150), as authority in support of his contention that the method of classification provided in the statute is discriminatory in operation and therefore unconstitutional. The rational of that decision on the question of classification was summarized by the Court as follows (p. 155): "That" (classification) "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily * * *."

The validity of a classification which imposes liability upon an employer of persons in excess of a designated number for a specified period, has been conclusively established. (*W. H. H. Chamberlain, Inc., v. Andrews*, 271 N. Y. 1, 299 U. S. 515; *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495).

The section is not discriminatory on its face as it applies to all employers in a designated class. In *Carmichael v. Southern Coal & Coke Co.* (*supra*, p. 511) the Court said: "Administrative convenience and expense in the collection or measurement of the tax are

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alone a sufficient justification for the difference between the treatment of small incomes or small taxpayers and that meted out to others."

The statute meets the test of legality which was defined in *Lindsley v. Natural Carbonic Gas Co.* (220 U. S. 59 p. 79):

> "1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of the police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

The final question to be considered relates to the continuance of the tax for the calendar year following that in which the number of persons employed is reduced to less than four.

Although the courts of this state have not passed upon this provision of the law, or at least no case has been called to my attention and my own research has produced none, similar provisions in the statutes of other states have been held constitutional. (*Maine v. Androscoggin Junior, Inc.*, 137 Me. 154, 16 A. 2d 252; *State v. Sosna*, 156 Kan. 722, 137 P. 2d 129; *Webb v. State*, Tex. Civ. App., 156 S. W. 2d 557; *Murphy v. Hurlbut Undertaking & Embalming Co.*, Supreme Court of Mo., Div. No. 1, 142 S. W. 2d 449.)

In *Webb v. State (supra)* an action was brought to recover unemployment compensation contributions due

for the year 1938. It was found that the employer became subject to the law in 1937 and paid the contributions for that year, and that he had filed no application for termination of coverage until March 1940. The employer contended that he ceased to be an employer under the law and was not liable for contributions for the year 1938 as he employed less than eight persons, which the statute designated as the classification subject to tax. He contended that continuation of liability was unconstitutional. The Supreme Court of Texas sustained the constitutionality of the provision and held that the provision for terminating coverage of an employing unit not employing eight or more individuals on any of twenty different days in different weeks during the calendar year preceding the employer's application for termination was not unconstitutional as making unreasonable and arbitrary classifications and exceptions.

Section 18, Subdivision II of the Statute of the State of Maine provides:

> "II. A. Except as otherwise provided in subsection III of this section an employing unit shall cease to be an employer subject to the provisions of this chapter as of the 1st day of January of any calendar year, only if it files with the commission, prior to the 20th day of January of such year, a written application for termination of coverage, and the commission finds that there were no 20 different days, each day being in a different week within the preceding calendar year, within which such employing unit employed 8 or more individuals in employment subject to the provisions of this chapter. For the purpose of this subsection, the two or more employing units mentioned in paragraph B or C or D of subsection IX of section 3 shall be treated as a single employing unit."

The employer in case of *Maine v. Androscoggin Junior, Inc. (supra)* became subject to the law in 1937 but during 1938 did not employ eight or more individuals. Liability for contributions for the year

1938 was denied by the employer and it contended that the requirement that a written application for termination of coverage be filed, was unconstitutional. In sustaining the constitutionality of the law, the Court said:

"The 1937 contribution, however, was paid. What is sought here from the company is payment for 1938, during which year it was not an employer under the rule of eight. For 1938 it can be held to contribute only if by operation of the law it was then an employer. The plaintiff says it was, because of Sec. 8 (b), which provides a right for the company before a certain date to file a written application for termination of coverage, which it failed to do. Failure so to do continued its status as an employer under the Act for 1938, although that year it did not actually employ the required eight either alone or jointly with Mr. Healy in his operation of the senior camp.

"This carry-over provision of said Sec. 8 (b) we consider reasonable and proper. It is somewhat analogous to the statutory duty placed upon inhabitants to make and bring in true and perfect lists of their taxable estates else be barred from making application to the assessors or county commissioners for abatement of taxes. Sec. 70 Chap. 13, R. S. 1930, as amended by Pub. Laws 1933, c. 180. Considering the beneficial effect of this carry-over provision in simplifying and lessening the work of the commission without unduly burdening the employer and at the same time giving it full protection, we hold that the statute is reasonable and unobjectionable."

The Kansas statute contains a similar provision. *State v. Sosna (supra)* was an action for the collection of contributions from an employer for the years, 1938, 1939 and 1940. The employer became subject to the law in 1938. He did not have the requisite number of employees to impose liability for the years 1939 to 1940. On April 18th, 1941 he filed an application for termination of coverage which was approved on

June 11th, 1941. The employer admitted his liability for contributions for 1938 and contended that the provisions of the statute requiring the filing of an application to avoid liability for 1939 and 1940 was unconstitutional. The Supreme Court of Kansas held that the original statute was reasonable and not unduly burdensome to the employer, and held that the statute was not unconstitutional.

Lastly, I am of the opinion that the constitutionality of the statute assailed by the plaintiff may be sustained on the ground of administrative convenience and necessity alone. The requirement that a written application must be made before an employer is released from liability, and a finding that he had not employed four or more persons during the calendar year preceding the application, is a reasonable requirement and conducive to the efficient administration of the law. It is conceivable that without this provision of the law many applications for unemployment insurance would have to await an investigation as to the qualification of the applicant. This would be an unwarranted hardship in view of the distress and immediate need which the law was designed to alleviate as appears from the statement of the public policy of the State as set forth in Section 501 of the Labor of Law. The provisions of the law apply to all employers within the specified class and do not impose an onerous burden on the privilege of employment. Moreover, the ultimate cost generally is borne by the consumer which includes those for whose benefit the law was enacted.

The defendant's motion for judgment on the pleadings, therefore, is granted, and the motion of the plaintiff denied.

Judgment accordingly.

Dated: Rome, New York, August 12th, 1953.

STATE OF NEW YORK,
Oneida County Clerk's Office, ss.:

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HAROLD B. WILLEY, Clerk

Argued by
Merwin K. Hart, Jr.

Supreme Court of the United States

October Term, 1953.

No. ~~810.~~ 116

LEO H. BOHLING,
Plaintiff-Appellant,

against

EDWARD CORSI, Commissioner, and/or DIVISION OF EMPLOYMENT OF THE DEPARTMENT OF LABOR OF THE STATE OF NEW YORK,
Defendants-Appellees.

Brief for Plaintiff-Appellant in Opposition to Appellees' Motion to Dismiss or Affirm.

MERWIN K. HART, Jr.,
Attorney for Plaintiff-Appellant,
196 Genesee Street,
Utica, N. Y.

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Argued by
Merwin K. Hart, Jr.

Supreme Court of the United States

OCTOBER TERM, 1953,

No. .....

LEO H. BOHLING,
Plaintiff-Appellant,

against

EDWARD CORSI, Commissioner, and/or DIVISION OF EMPLOYMENT OF THE DEPARTMENT OF LABOR OF THE STATE OF NEW YORK,
Defendants-Appellees.

BRIEF FOR PLAINTIFF-APPELLANT IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

The appellant in the above entitled cause for his brief in opposition to appellees' motion to dismiss or affirm, respectfully shows the following:

POINT I.

Statement of the issues of this motion.

Because this brief is due ten days ahead of the return date indicated by the citation and order signed by the

Justice of this Court who allowed the appeal herein, and because there is some uncertainty as to whether or not our papers in support of jurisdiction will be printed and distributed to the Supreme Court when it decides this motion, we wish to bring to the Court's attention that the only relevant argument raised by the appellees herein in support of their motion to dismiss is their contention that "There is no substantial question presented by this appeal entitling appellant to invoke the jurisdiction of the Supreme Court of the United States."

The defendants-appellees in their statement in opposition to jurisdiction have herein conceded that they have admitted the facts alleged in appellant's complaint, and denied the legal conclusions thereof.

The appellees comment on the finding of the Court of the first instance herein, as follows: "The requirement that a written application must be made before an employer once subject to the law is released from liability upon a finding that he has not employed four or more persons during the calendar year preceding the application is a reasonable one and conducive to the efficient administration of the law."

The appellant's objections to the validity of Section 562, subdivision 1, of the Labor Law of New York State have never been based on the requirement of a written application, but on the requirement of an extra year's liability for a tax after the conditions on which the tax is based have ceased to exist, before such an application may be entertained.

Since no application for termination of coverage, and no other administrative procedure has been set up providing for termination of coverage before the end of the extra year, the question as to whether or not the appellant filed a written application to cease coverage is im-

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material to this case, unless the extra year's assessment is found to be constitutional.

This point seems to have been recognized by the Court of first instance, in that most of his discussion was devoted to the question of the constitutionality of the extra year's liability.

POINT II.

A substantial federal question has been presented by this appeal.

To succeed on this motion, the appellees must show that the question presented by this appeal is not a "substantial" federal question.

What is meant by a question that is not "substantial" was stated by this Court in the case of *Missouri Pacific R. Co. v. Castle*, 224 U. S. 541, as follows: that "The questions here urged have been so plainly foreclosed by decisions of the Supreme Court as to make further argument unnecessary."

Most of the arguments of the appellees in support of their motion to dismiss or affirm appear to be addressed more to the merits of the case, rather than to the proposition whether or not the case raises a substantial federal question, the cases cited being the same, or holding similar to cases cited by appellant in his statement in support of jurisdiction.

The issue in this case is the validity of a provision of a tax measure that operates as follows: employers of four or more employees for fifteen or more days in a calendar year must pay a tax of 2.7 per cent on their pay roll. Employers of three or less are not required to pay. Em-

ployers of three or less whose pay roll rises to four or more for at least fifteen days in a calendar year, and then reverts to three or less, must pay the tax not only in the year that their pay roll strength is four or more, but the next calendar year after the last one wherein they were of a size sufficient to warrant tax liability.

Thus, liability for the remainder of a year, and for the next full year, is based on a previous status of the taxpayer.

This tax is an innovation in American tax law, a departure from a custom that has existed from time immemorial, of determining a taxpayer's liability for a given tax according to his actual status during the period of taxation, without regard to previous status. It operates as a hardship on small employers who are accordingly required to pay a substantial tax amounting to 2.7 per cent of what may be a nine thousand dollar pay roll; whereas, in the same year their competitors in the same business, same location, and of the same sized pay roll are not taxed. The sole distinction between those taxed and those not taxed is based on a past condition.

The fact that forty-one other states have a substantially similar measure in their unemployment insurance laws is an indication of the large number of persons that should be affected by this case. Moreover, in 1949, the New York State Legislature passed Section 202 of the Workmen's Compensation Law, incorporating into the Disability Benefits Law a similar means of continuing liability an extra year after the facts upon which liability was based ceased to exist, indicating that this case raises an issue as to the validity of a new means of levying tax that may be used extensively in the future.

The fact that in the seventeen-year history of this and similar statutes, no case involving their validity has

reached the Supreme Court, is explained by the fact that those affected, employers of three or less, when assessed an illegal tax of two hundred and forty-three dollars, are unlikely to have the resources to support an extensive constitutional litigation.

We know of no similar tax that has ever been imposed on the American taxpayer.

Since the appellees have cited the case of *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, we also quote it as in accord with holdings of the Supreme Court on the question of "Equal Protection" and State taxes, and submit that it reads as follows (at p. 513):

> "In no case do appellees sustain the burden on them of showing that *there are no differences between the exempt employers and the industrial employers who are to be taxed, sufficient to justify differences in taxation.*" (Italics added.)

Thus, the *Carmichael* case actually holds that the equal protection clause protects employers from taxes "where there are no differences between taxed and exempt employers"; the words "sufficient to justifying differences in taxation" meaning differences that are substantial and not trivial.

In the *Carmichael* case, all pay rolls of eight or more employers were taxed. An employer sought to invalidate the tax on the ground that the exemption of all the small employers was unfair to the larger ones. Thus, in the *Carmichael* case, there was no question of an extra year's liability. There, the small pay rolls, all those of under eight, were treated alike, whereas in the instant case, a small employer is being taxed while his competitors in the same situations are not.

The appellees herein further deduce from the *Carmichael* case the proposition: "The equal protection clause

of the Constitution does not impose upon the State any rigid rule of equality of taxation" (509). This the appellant concedes, if the word "rigid" is correctly defined. The Court's meaning of the above quotation is shown in the case of *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 59, at 78, as follows: "A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because it results in some inequality."

This and similar cases merely show that this Court allows the State a wide margin of discretion in levying taxes, for the reason that it would be impossible for a government composed of human beings to levy a system of taxation that is perfect. These cases do not hold that states are bound by no rules of equality whatsoever. On the contrary, cases uniformly hold that a tax is not a violation of the equal protection clause so long as all persons in the same situation are treated in the same way.

In accord:

Florida Central Railroad Company v. Reynolds, 183 U. S. 471, at 477.
Michigan Central Railroad v. Powers, 201 U. S. 245, at 293.
Grozzer v. Tiernan, 148 U. S. 657, at 662.
Gulf, Colorado & Santa Fe R'd v. Ellis, 165 U. S. 150, at 155.
Missouri Railroad Company v. Mackey, 127 U. S. 205.

The crux of this case is that two employers, each employing three or less, one of whom has in the past employed four or more, are currently taxed differently; the difference being based on the past status of one of those employers—in short, they are not being treated the same way.

The appellees further cite the *Carmichael* case as holding "inequalities resulting from singling out any particular class for taxation or exemption do not infringe any constitutional rights."

In this case, the extra year's tax does not "single out any particular class," but actually imposes liability where others in the same class escape taxation.

The Court of first instance herein relied on the *Carmichael* case (*supra*) by quoting it at page 511:

> "Administrative convenience and expense in the collection or measurement of the tax alone are a sufficient justification for the difference between the treatment of small incomes and employers and that meted out to others."

We submit that the above quotation was used to uphold a tax on employers of eight or more, and exempting those of less than eight, and that the *Carmichael* case did not present an issue of different tax liability for those similarly situated, and is no precedent in support of a tax that is levied on large numbers of small employers, and not on others in the same situation.

The appellees further cite the case of *Rapid Transit Corp. v. New York*, 303 U. S. 573, in support of his contention that the question raised in this appeal is not substantial. That case contains little, if anything, relevant to this appeal that has not already been covered, yet we quote the following at page 580:

> "Freedom from unlimited, direct, private competition is of itself a sufficient advantage over ordinary business to warrant an imposition of a heavier tax burden."

Thus, even in this case, the Court stressed the fact that one taxpayer had an advantage over another kind of taxpayer sufficient to warrant a different treatment in taxation.

Most, if not all, cases involving an interpretation of the Equal Protection clause in relation to taxation, are instances where states laid taxes on certain occupations, businesses or concerns that were not laid on others that were at most superficially similar, but were in reality a different kind of taxpayer.

In *Belle's Gap Railroad Co. v. Pennsylvania,* 134 U. S. 232, at 237, this Court states that no general rule is possible regarding equal protection, in the following sentence:

> "It would, however, be impracticable and unwise to lay down any general rule or definition that would include all cases. *They must be decided as they arise.*" (Italics added.)

None of the cases cited refer to a tax such as this one, which prescribes an extra year's liability for a tax from which one's competitors in the same current situation are exempt.

There is no merit to appellees' contention that this appeal raises no substantial question, or that previous Supreme Court decisions preclude a hearing of the case.

POINT III.

Section 562, Subd. 1, of the Labor Law of New York State, providing for a continuation of a 2.7% pay roll tax for one full calendar year after the last year wherein employer employed four or more employees for at least fifteen days, violates the "equal protection" clause of the Fourteenth Amendment of the constitution.

Two generalizations can be made in regard to the power of a State Legislature to classify for purposes of taxation: First, the Legislatures are vested with a wide discretion; and, secondly, that discretion is limited by "reasonable limits" and "general usage." Thus, in *Gulf, Colorado & Santa Fe Railway,* 165 U. S. 150, at 155, the Supreme Court, discussing the validity of a State tax, said:

> "the question was presented as to the power of the State to classify for purposes of taxation, and while it conceded that a large discretion in these respects was vested in the various legislatures, THE FACT OF A LIMIT TO SUCH DISCRETION was recognized by the Court, by Mr. Justice Bradley, saying (in *Belle Gap Railroad v. Pennsylvania,* 134 U. S. 232): 'all such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature.'" (Italics added.)

That the provision of law requiring an extra year's liability after one ceases to employ four or more is unusual, is hardly open to question. Thus far, neither appellant nor appellees, after a presumably extensive research, has uncovered a similar tax law other than these forty-one state unemployment insurance laws, and the said New York Workmen's Compensation Law obviously copied from it.

It would seem that from time immemorial, there has been an understanding among attorneys and laymen alike, that taxes came due periodically, usually by the year; and that to determine liability, one compared one's current status with the rules then applicable. At all known times, a taxpayer would be surprised to learn that he must pay a tax that other similarily situated need not pay, simply because he had been liable in a previous and closed calendar or fiscal year.

The Supreme Court of the United States has stressed the importance of precedent in determining constitutional rights. Thus, in *Near v. Minnesota*, 283 U. S. 679, at 718, this Court stated:

> "The fact that for approximately 150 years there has been an almost entire absence of attempts to impose previous restraints on publication, * * * is significant of the deep-seated conviction that such a restraint would violate constitutional right."

While the argument of lack of precedent, standing alone, might carry small weight, in the presence of compelling public necessity, could any be shown to exist, yet when a means of taxation is completely novel, one should study its operation to ascertain why it has not been previously called into usage.

This provision of an extra year's liability affects only those employers of three or less whose pay roll jumps to four or more for fifteen days, and then reverts to its original status. These are the very small businesses; retailers, gas stations, diners, drugstores and, like the appellant, small contractors, i. e., those doing business on so small a scale as to be virtually glorified fellow-workers, rather than executives. They furnish vital services all over America, and provide large numbers of jobs.

In normal times business is highly competitive. The struggle to reduce overhead is continuous. A tax on one business and not on its competitor similarly situated at a given time is difficult to pass on to the consumer. It is an undue burden, and a discrimination. All state tax laws thus far sustained by this Court have been designed to operate equally on those in the same situation, and have been sustained on that ground.

The New York Supreme Court relied on the *Carmichael* case (*supra*) as holding that: "Administrative convenience and expense of collection or measurement of the tax are alone a sufficient justification for the difference between the treatment of small incomes or small taxpayers and that meted out to others" (p. 511). It is submitted that this passage does not even by implication justify a tax on some small employers, while their competitors, currently similarly situated, do not pay it. The argument of administrative convenience has been used to support a tax and justify an exemption solely in cases where another method would mean prohibitive expense to collect a small return; it has never been used to continue liability after the facts on which liability has been based ceased to exist, for some sociological purpose of the government, or because the government finds it "convenient" to keep the taxpayer paying. Convenience of the government is an argument that can never be used to deprive citizens of fundamental rights.

For example, the thus far unreported segregation decision will create inconvenience to the tune of millions of dollars for those southern states which recently built schools relying on the theory of "separate but equal" facilities, and which now must revamp their systems to meet the supreme law of the land. Yet the Court seems not to have been influenced by such a consideration, in determining the rights of the school children concerned.

Certainly there is a legitimate scope to the doctrine of "administrative convenience," but it falls far short of holding that any tax is valid, so long as it is convenient to collect and administer.

The appellees justify this tax because, in their words:

> "It prevents a situation where an employee might be employed in covered employment for a short period of time and then be engaged in non-covered employment with resulting ineligibility for benefits in case he became unemployed. This carry-over provision insures that employees who have once become employed in covered employment will remain in that status for the remainder of the calendar year, in which the event causing the liability of the employer for the payment of these excise taxes occurred, and at least for the following calendar year."

The appellant does not dispute the good intentions of the framers of this law. Good intentions alone are not enough. Conceding that it is socially desirable to have as many employees as possible covered with unemployment insurance, that result must and in fact can be achieved by non-discriminatory means.

Even the acclaimed purpose of this extra year's liability is far from realized under the present law, since whenever liability ceases, the State must here, as in any other case, face the problems which inevitably arise when liability runs out. The novel expedient of requiring the taxpayer to pay for an extra year merely postpones an inevitable period when there must be some change and confusion.

Actually, there are other and more effective means of providing coverage for employees whose employers are no longer subject to tax liability. For one thing, since the percentage of employees apt to be left uncovered by unemployment insurance benefits, because their

employers are no longer liable, is such a small fraction of the total employed population subject to the tax, the reserve fund could easily be made to absorb the costs of protecting such workers. Of course, if and when the Legislatures amend the laws providing that all pay rolls, regardless of number of employees, will be taxed, the problem posed by this case would end; all workers would thus be covered, and their respective employers taxed in proportion to their annual pay roll; and the taxes would be passed on to the consumer.

The fact that the New York Legislature has already passed a statute, since this case was decided in the New York Court of Appeals, providing for taxing all pay rolls, regardless of size—said statute to become effective upon the passage of appropriate Federal legislation, is significant of the fact that this extra year's assessment has never been essential to a well-thought-out system of unemployment insurance.

A fundamental idea of all insurance is the creation of a fund against a rainy day, by the pooling of monies. This has proved sound in many fields as long as both the contributions and the distribution of benefits are fair and equitable.

The statute in question creates both an insurance and a tax. As a tax it is not voluntary; it is imposed. It must therefore be measured on some clearly defined basis —the usual, customary and accepted practice in this country is to assess taxes on some basis current to all taxpayers involved. To depart from this principle is to create a new theory of taxation.

We submit that the "equal protection" clause of the Fourteenth Amendment is not by definition or by judicial interpretation limited to protection in cases where the taxing authority has an evil motive against the tax-

payer concerned; that its scope includes any instance, such as the instant case, where a bizarre rule of law operates with obvious injustice against the taxpayer so as to strike at his very livelihood.

The very idea of presumed continuous liability, as defined in said Section 562, subdivision 1, of the New York Labor Law, is the novel proposition of the State saying: "We have them paying; we will keep them paying." That this notion leads to oppression on the part of the taxing power is almost self-evident; yet, we would like to cite a single instance of a case that resulted from the application of this law, *Matter of Kramer*, 126 N. Y. S. 2d 433. In the *Kramer* case, the taxpayer employed workers (students) who were covered until 1942, when the Legislature passed a statute exempting employers in so far as their employees were students. In 1951 the appellees herein sued to collect nine years' back taxes arguing that even though the Legislature passed a law exempting this particular class of employer, yet because Kramer had not filed an application, he still owed taxes for all intervening years. Kramer's defense was that he thought the law terminated his liability automatically. Although the Courts eventually relieved him from this oppressive assessment, it was only after he had undergone an extensive litigation in appellate courts.

While the State must be supported by laws providing appropriate penalties for wilful and negligent violators of our tax laws, this kind of statute tips the scales too far in the interests of the State against the citizen.

In an age that has seen an increasing percentage of our national income devoted to government budgets, the very idea of democracy becomes meaningless, if it does not include a minimum standard of fair play for the taxpayer; a reaffirmation of the Court's repeated holdings that "equal protection" means the same tax for all

in the same situation. Indeed, the policy of the Bureau of Internal Revenue, and all other enlightened tax collection agencies, has been a well-publicized policy of taking great pains to evolve tax laws that operate with fairness on all citizens. Each year sees new clauses that are designed to eliminate some measure of the law that seemed inequitable and unjust.

The provision of an extra year's liability based on past liability is a trap. If permitted to exist, it cannot be justified even on the ground of providing more employees with unemployment insurance benefits, because as more and more employers learned of this legal pitfall, they would go to great lengths to avoid a fourth employee, and in the long run fewer workers would be receiving the benefits of unemployment insurance.

Lastly, we submit that the cases laid down by this Court, from the time the Fourteenth Amendment was adopted, uniformly hold that the test of whether a tax law deprives a taxpayer of equal protection is whether or not others, similarly situated, are required to pay.

Here, there is no present difference between those taxed and those not taxed at all. A difference based on past history is not sufficient to justify differences in taxation. The idea is as startling as it would be to tax an owner of a bungalow on the basis that he had previously lived in a luxurious mansion.

Wherefore, appellant respectfully moves that the motion of the appellees to dismiss, or in the alternative to affirm the decision of the Court of Appeals of the State of New York be denied.

POINT IV.

The motion of the appellees to dismiss or affirm should be denied, and the case held for argument, on the merits.

Dated: Utica, New York, May 25, 1954.

MERWIN K. HART, Jr.,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 116

LEO H. BOHLING,

Appellant,

vs.

EDWARD CORSI, COMMISSIONER, AND/OR DIVISION OF EMPLOYMENT OF THE DEPARTMENT OF LABOR OF THE STATE OF NEW YORK,

---

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 116

LEO H. BOHLING,

Appellant,

vs.

EDWARD CORSI, COMMISSIONER, AND/OR DIVISION OF EMPLOYMENT OF THE DEPARTMENT OF LABOR OF THE STATE OF NEW YORK,

Appellees

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellees in the above entitled cause for their joint statement in opposition to appellant's statement as to jurisdiction herein, and in support of appellees' motion to dismiss or affirm, respectfully show the following:

I. Statement of Issues on Appeal

The question sought to be presented in this appeal, as set forth in the petition to this Court for appeal, is whether "the Court of Appeals of New York erred in finding Section 562, Subdivision 1, of the Labor Law of New York State constitutional, insofar as it provides a compulsory tax of

2.7% of pay roll of employer for one full calendar year after the last year wherein said employer employed four or more employees for fifteen days or more."

The statute here under attack is § 562, subd. 1, of the New York Unemployment Insurance Law, being § 562, subd. 1, of Article 18 of the Labor Law of New York (McKinney's Consolidated Laws of New York, Vol. 30), and reads as follows:

> "§ 562. Termination of coverage:
>
> "1. Required coverage. Any employer who has once become liable for contributions under this article shall cease to be liable under the following conditions:
>
> "a. If he files a written application with the commissioner during the fourth calendar quarter, he may be released from coverage as of the first day of the next calendar quarter provided the commissioner finds that the employer has not employed four or more persons in employment within each of fifteen or more days in the completed calendar year in which the application is filed.
>
> "b. If he files a written application with the commissioner in any other calendar quarter of the year he may be released from coverage as of the first day of the calendar quarter following the filing of the application provided the commissioner finds the employer has, before such day, in neither the calendar year in which the application is filed nor in the preceding calendar year, employed four or more persons in employment within each of fifteen or more days."

The case originated in the Supreme Court of the State of New York by the service of a summons and complaint upon the defendants-appellees, in which it was set forth that the plaintiff-appellant, from April, 1947 to January, 1951, employed four employees, and that some time in the first quarter of 1951 said plaintiff ceased to employ four employees, and since that time has at all times employed less than four

employees, and that the Industrial Commissioner has assessed an unemployment insurance tax against the plaintiff "for one full year or more after the date he ceased to employ four persons." The plaintiff-appellant had not filed an application to cease to be subject to the law at the time of the commencement of the suit. The complaint demanded judgment declaring § 562, subd. 1, of the Labor Law of New York to be unconstitutional upon the ground that it sets up an arbitrary and unreasonable classification for the tax, in that it compels employers of three or less to pay the tax if they employed four persons in a previous year, and exempts from such taxation those employers of three persons who have not employed more than three persons in the prior year or years. The complaint further alleges that the statute denies an equal rate of taxation under such circumstances.

The defendants-appellees filed an answer admitting the facts set forth in the plaintiff's complaint and denying the legal conclusions therein, and asked for judgment declaring said statute to be constitutional.

The plaintiff and defendants moved for judgment on the pleadings, and on August 12, 1953, Mr. Justice Ringrose of the Supreme Court of the State of New York, handed down his opinion upholding the constitutionality of said statute, and granting the motion of the defendants for judgment, and denying the motion of the plaintiff. The opinion of the court is reported at 204 Miscellaneous Reports of New York, page 778. Judgment upholding the constitutionality of the statute was entered in the office of the Clerk of the County of Oneida, New York, on August 26, 1953.

Appellant appealed directly from said judgment to the Court of Appeals of New York, which handed down its decision on March 4, 1954, unanimously affirming the judgment appealed from without opinion. The decision of the Court of Appeals is reported at 306 N. Y. 815. Judgment on

the remittitur of the Court of Appeals was entered in the office of the Clerk of the County of Oneida, New York, on March 22, 1954.

The Supreme Court of New York and the New York Court of Appeals held that the statute under attack provides a reasonable and rational basis of classification of employers subject to the unemployment insurance tax where an employer ceases to employ four or more persons; that it is not discriminatory on its face and applies to all employers in a designated class. The court further found that the requirement that a written application must be made before an employer once subject to the Law is released from liability upon a finding that he has not employed four or more persons during the calendar year preceding the application is a reasonable one and conducive to the efficient administration of the law.

II. No Substantial Federal Question Is Presented by the Attempted Appeal

An employer becomes subject to the payment of the tax imposed by the New York Unemployment Insurance Law if he employs in all his several places of employment in the State four or more persons in employment on fifteen or more days in any calendar year, and such liability commences on the first of such fifteen days of employment (New York Labor Law § 560, subd. 1). Under § 562, subd. 1 of that statute, such an employer remains subject to the payment of the tax until he files a written application to be relieved of liability, and such application must be approved by the Industrial Commissioner of the State. If the employer files such a written application during the fourth calendar quarter of any year, he may be released from liability as of the first day of the next calendar quarter if the Commissioner finds that he has not employed four or more persons in employment within each of fifteen or more days in

the completed calendar year in which the application is filed. If the application is filed in any other calendar quarter of the year, the employer may be released as of the first day of the calendar quarter following the filing of the application if the Commissioner finds he has in neither the calendar year in which the application is filed nor in the preceding calendar year employed four or more persons in employment within each of fifteen or more days.

It appears to be appellant's contention that the statute is unconstitutional in that it discriminates by requiring employers who have reached the taxable condition by the employment of four or more persons within each of fifteen or more days in one calendar year to continue to pay the tax based upon the wages of their employees in the year following that event, even though during that year he did not employ four persons, whereas another employer who has not employed four or more persons in the preceding calendar year is not required to pay the tax during the following calendar year. This argument overlooks the fact that in one case the employer has reached the taxable stage, while in the other case the employer has never reached that stage. These unmployment insurance taxes are excise taxes imposed for the privilege of exercising the right to have persons in one's employ (*Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495; *Standard Dredging Corp.* v. *Murphy*, 319 U. S. 306).

The reason for the enactment of the statute under attack is apparent. It prevents a situation where an employee might be employed in covered employment for a short period of time and then engaged in non-covered employment with resulting ineligibility for benefits in case he became unemployed. This carryover provision insures that employees who once become employed in covered employment will remain in that status for the remainder of the calendar year, in which the event causing the liability of the employer for

the payment of these excise taxes occurred, and at least for the following calendar year. It insures continuity of the status of both employer and employee until such time as the employer files application to be released from liability by showing that he has not employed four or more persons for the required period of time.

The statutory provision under consideration is not unique. Provisions not substantially different are to be found in the unemployment insurance statutes of forty-one other states as follows:

Alabama Unemployment Compensation Law § 224;
Arizona Employment Security Act § 56-1008;
Arkansas Employment Security Act § 81-1111 (b);
Colorado Employment Security Act § 8;
Connecticut Unemployment Compensation Law § 7496;
Delaware Unemployment Compensation Law § 3342;
Florida Unemployment Compensation Law § 443.09;
Georgia Employment Security Law § 8;
Idaho Employment Security Law § 52;
Illinois Unemployment Compensation Act § 301;
Indiana Employment Security Law § 902;
Iowa Employment Security Law § 96.8(2);
Kansas Employment Security Law § 44-711(b);
Kentucky Unemployment Insurance Law § 341.250;
Louisiana Employment Security Law § 1572;
Maine Employment Security Law § 18 II;
Massachusetts Employment Security Law § 11;
Michigan Employment Security Act § 24;
Mississippi Employment Security Law § 7393;
Missouri Employment Security Law § 288.080(2);
Montana Unemployment Compensation Law § 87-110;
Nebraska Employment Security Law § 48-661(b);
New Hampshire Unemployment Compensation Law § 7(b);

New Jersey Unemployment Compensation Law §43:21-8(b);
New Mexico Unemployment Compensation Law § 57-808(b);
North Carolina Employment Security Law § 96-11;
North Dakota Unemployment Compensation Law § 52-0504;
Oklahoma Employment Security Act § 218(b);
Oregon Unemployment Compensation Law § 126-702(e);
Rhode Island Employment Security Act § 3(5)(e);
South Carolina Unemployment Compensation Law § 68-253;
South Dakota Employment Security Law § 17.0823(2);
Tennessee Employment Security Law § 6901.8B;
Texas Unemployment Compensation Act § 8(c);
Utah Employment Security Act § 42-2a8(b);
Vermont Unemployment Compensation Law § 5365;
Virginia Unemployment Compensation Act § 60-83;
West Virginia Unemployment Compensation Law Art. V, § 2;
Wisconsin Unemployment Reserves & Compensation Act § 108.02(4)(g); and Wyoming Employment Security Law § 54-108(B).

The courts of several States have held these statutory provisions to be constitutional—

State v. *Sosna*, 156 Kan. 722;
Maine Unemployment Compensation Commission v. *Androscoggin Junior, Inc.*, 137 Me. 154;
Murphy v. *Hurlbut Undertaking & Embalming Co.*, 346 Mo. 405;
Shelton Hotel Co., Inc. v. *Bates*, 4 Wash. (2d) 498; and
Webb v. *State*, Tex. Civ. App., 156 S. W. 2d 557 (not officially reported).

The State of New York, in its exercise of the power to tax, is free to select the subject of taxation and to grant exemptions. The "equal protection" clause of the constitution does not impose upon the State any rigid rule of equality of taxation, and this Court has often held that inequalities resulting from singling out any particular class for taxation or exemption does not infringe on any constitutional limitation (*Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, at 509; *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573).

The appellant here has failed to carry the burden of showing that the statute does not rest upon any reasonable basis, and that it is essentially arbitrary (*Lindsey* v. *Natural Carbonic Gas Co.*, 220 U. S. 59, at p. 79). Administrative convenience also justifies the statutory provision (*Carmichael* v. *Southern Coal & Coke Co., supra*, at p. 511).

We respectfully submit that there is no substantial question presented by this appeal entitling appellant to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE, appellees respectfully move that the within appeal be dismissed or that the judgment of the Court of Appeals of the State of New York be affirmed.

Dated: Albany, New York, May 10, 1954.

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No. 116. BOHLING *v.* CORSI, COMMISSIONER, DIVISION OF EMPLOYMENT, DEPARTMENT OF LABOR OF NEW YORK. Appeal from the Court of Appeals of New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Merwin K. Hart, Jr.* for appellant. *Nathaniel Goldstein*, Attorney General of New York, *Wendell P. Brown*, Solicitor General, and *Francis R. Curran*, Assistant Attorney General, for appellee. Reported below: 306 N. Y. 815, 118 N. E. 2d 823.

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